

The Honorable James L. Robart

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

GABRIEL KORTLEVER, SY EUBANKS, ) Case No.: 2:18-cv-00823  
and ALL OTHERS SIMILARLY SITUATED,) )  
Plaintiffs, ) DEFENDANT'S RESPONSE TO  
vs. ) PLAINTIFF'S MOTION TO CERTIFY  
WHATCOM COUNTY, WASHINGTON; ) CLASS  
WHATCOM COUNTY SHERIFF'S OFFICE ) ) NOTED FOR MOTION CALENDAR:  
Defendants. ) JULY 13, 2018

TO: PLAINTIFFS, above-named,

Come now, Defendants herein, with the following response to the Defendant's motion for class certification. The Defendant respectfully asks this court to deny plaintiff's motion pursuant to Federal Rule of Civil Procedure 23(a). Alternatively, the Defendant respectfully requests the Court postpone its determination of class certification pursuant to Federal Rule of Civil Procedure 23(c)(1)(a) and Local Rules W.D. Wash. 23 (i)(3).

Defendant's Opposition to Motion to Certify Class - 1

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## INTRODUCTION

1 On June 6, 2018 the Plaintiffs filed this civil rights action requesting declaratory and  
 2 injunctive relief under 28 U.S.C. §1334 for violation of American's with Disabilities Act under  
 3 42 U.S.C. §12101 (hereinafter, ADA) while in custody at the Whatcom County Jail. The  
 4 Plaintiffs' complaint (hereinafter, complaint) alleges that during their incarceration at the  
 5 Whatcom County Jail:

- 7 1) The Plaintiffs were qualified individuals as defined by the ADA based upon previous  
 diagnosis' of Opioid Use Disorder (hereinafter, OUD).<sup>1</sup>
- 8 2) Due to be diagnosed with OUD the Plaintiff had previously received prescriptions for  
 either methadone or buprenorphine.<sup>2</sup>
- 9 3) The Whatcom County Jail denied the Plaintiffs treatment with methadone,  
 buprenorphine (including the drugs Suboxone and Subutex), or any other equivalent  
 drug.<sup>3</sup>
- 11 4) The Whatcom County Jail prescribes the drug Subutex to OUD inmates that screen  
 positive during pregnancy testing.<sup>4</sup>

12 On June 6, 2018 Plaintiff's simultaneously filed their motion to certify class pursuant to  
 13 Federal Rule of Civil Procedure 23 (hereinafter, "Plaintiff's Motion"). The Plaintiff's motion  
 14 states that:

- 16 1) Whatcom County suffers from an opioid epidemic that affects this entire nation.<sup>5</sup>
- 17 2) People suffering from OUD are protected by the ADA.<sup>6</sup>
- 18 3) Medically Assisted Treatment (hereinafter, MAT) is a clinically proven treatment  
 regime for people diagnosed with OUD.<sup>7</sup>
- 19 4) The Whatcom County Jail currently uses MAT by providing the drug Subutex to OUD  
 inmates that screen positive during pregnancy testing.<sup>8</sup>

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21 <sup>1</sup> See, *Complaint* p. 4 at No. 15 & 16.

22 <sup>2</sup> See, *Id.*

23 <sup>3</sup> See, *Complaint* p. 15 at No. 69. See also, *Complaint* p. 17 at No. 79.

24 <sup>4</sup> See, *Complaint* p. 12 at No. 50.

<sup>5</sup> See, *Plaintiff's Motion to Certify Class* p. 2-4.

<sup>6</sup> See, *Id* at 4-6.

<sup>7</sup> See, *Plaintiff's Motion to Certify Class* at 6-8.

<sup>8</sup> See, *Id.* at 8-11.

1           5) The Whatcom County Jail refuses to provide MAT to OUD persons that are not  
 2           pregnant.<sup>9</sup>

3           The Plaintiff's proposed class action names two persons: Sy Eubanks and Gabriel  
 4           Kortlever. The Plaintiffs state that Mr. Eubanks was diagnosed with OUD, and treated with  
 5           MAT by his health care providers.<sup>10</sup> Mr. Eubanks was originally prescribed methadone treatment  
 6           fifteen years ago by the Islands Crossing Counseling service in Arlington Washington.<sup>11</sup> Most  
 7           recently, Mr. Eubanks was treated with Suboxone by the Sea Mar Community Health Center.<sup>12</sup>  
 8           The Plaintiff's Complaint states that Mr. Kortlever was diagnosed with OUD and treated with  
 9           MAT by Cascade Medical Advantage in March of 2018.<sup>13</sup> The Plaintiffs' proposed class action  
 10           additionally names all other similarly situated Plaintiffs. The Plaintiffs cite that Whatcom County  
 11           Jail's records indicate in 2016 two hundred and fifty-three people self-reported the abuse of  
 12           heroin or other opiates during their incarceration.<sup>14</sup>

13           Mr. Eubanks and Mr. Kortlever were both asked a series of questions during their most  
 14           recent bookings into the Whatcom Jail. On September 15, 2017 Mr. Eubanks was asked by the  
 15           Whatcom County Jail staff if he was under a doctor's care, and Mr. Eubanks responded: "yes  
 16           psorsis...dro boughsted."<sup>15</sup> Mr. Eubanks was asked if he took medications, and he responded:  
 17           "yes gabapentin, Lasix, spiro lactum, hydroxozene, hepatitis meds, blood pressure."<sup>16</sup> Mr.  
 18           Eubanks was asked if he used street drugs, and he responded: "yes meth and suboxone...states  
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21           <sup>9</sup> See, *Plaintiff's Motion to Certify Class* at 8-11.

22           <sup>10</sup> See, *Complaint* p. 4 at No. 15.

23           <sup>11</sup> See, *Id.* p. 15 at No. 66 & 67.

24           <sup>12</sup> See, *Id.* p. 15 at No. 68

25           <sup>13</sup> See, *Id.* p. 4 at No. 16. See also, *Id.* p. 17 at No. 78.

<sup>14</sup> See, *Id.* p. 6 at No. 23. See also, *Complaint* Exhibit 1.

<sup>15</sup> See, Exhibit 1, p. 1 at No. 8.

<sup>16</sup> See, *Id.* at No. 13.

1 he will withdrawl...used 30 minutes ago.”<sup>17</sup> On April 20, 2018 Mr. Kortlever was asked the  
 2 same set of questions during his most recent booking into the Whatcom County Jail.<sup>18</sup> When  
 3 asked if he was under a doctor’s care Mr. Kortlever said: “no.”<sup>19</sup> When asked if he received  
 4 medications Mr. Kortlever said: “yes suboxone.”<sup>20</sup> When asked if he used street drugs Mr.  
 5 Kortlever said: “yes used meth today.”<sup>21</sup>

6 MAT has been described by the Substance Abuse and Mental Health Services  
 7 Administration as a direct service that provides both behavioral therapies in conjunction with  
 8 pharmacotherapy.<sup>22</sup> MAT treatment is an individualized medical treatment procedure.<sup>23</sup>

#### 9 PROCEDURAL HISTORY

10 On June 6, 2018 the Plaintiffs filed their Complaint requesting declaratory and injunctive  
 11 relief for violations of ADA. On June 6, 2018 the Plaintiff’s also filed their Motion to Certify  
 12 class. On June 28, 2018 the Defendant filed a dispositive motion under Federal Rule of Civil  
 13 Procedure 12 (b)(6), and requested that motion be heard July 27, 2018.  
 14

#### 15 ARGUMENT

16 A. The Plaintiffs’ motion to certify class should be stayed at this time because it is not  
 17 practicable at this stage of the litigation.

18 Federal Rule of Civil Procedure (hereinafter, FRCP) 23(c)(1)(a) states the time to issue a  
 19 certification order is at an early practicable time. Local Rules W.D. Wash. (hereinafter, LCR) 23

21 <sup>17</sup> See, Exhibit 1. p. 2 at No. 23.

22 <sup>18</sup> See, Exhibit 2.

23 <sup>19</sup> See, *Id.* p. 1 at No. 8.

24 <sup>20</sup> See, *Id.* p. 1 at No. 13.

<sup>21</sup> See, *Id.* p. 2 at No. 23.

<sup>22</sup> See, Catherine A. Fullerton et. al., “Medication-Assisted Treatment with Methadone: Assessing the Evidence,” *Psychiatric Services* 65, no. 2, p. 146 (February 2014).

<sup>23</sup> See, *Id.*

1 (i)(3) states that time to certify class is within one hundred and eighty days after filing the  
 2 complaint. LCR 23 (i)(3) additionally states that:

3 The court...may order postponement of the determination pending discovery or  
 4 such other preliminary procedures as appear appropriate and necessary in the  
 5 circumstances. Whenever possible, where the determination is postponed, a date  
 6 will be fixed by the court for renewal of the motion.

7 FCRP 23(c)(1)(a) has been interpreted to allow courts the discretion to handle dispositive  
 8 motions prior to more complex motions to certify class.<sup>24</sup>

9 Here, the Plaintiffs' motion to certify class is premature. The Complaint names two  
 10 Plaintiffs. The Plaintiffs argue there is a large number of unnamed persons forming a prospective  
 11 class that would satisfy the numerosity requirement under FCRP 23(a)(1) . That issue is briefed  
 12 in greater detail in the following section of this response. The Defense responds that the evidence  
 13 presented by the Plaintiffs is insufficient to adequately project the numerosity of unnamed class  
 14 members. However, conducting further discovery may allow for the presentation of additional  
 15 evidence that would allow for an accurate projection of the number of OUD persons detained in  
 16 the Whatcom County Jail currently, and the number of OUD persons incarcerated in recent  
 17 years. Whatcom County Jail maintains detailed medical records that would be relevant to  
 18 determining the prospective number of unnamed class members.

19 Further, Defendant has noted a dispositive motion under FCRP 12(b)(6). Similar to  
 20 *Curtin v. United Airlines* this court has the discretion to hear the dispositive motion prior to the  
 21 motion to certify class if the court determines that is the more practical order of events.

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24 See, *Curtin v. United Airlines*, Inc., 275 F.3d 88, 92 (D.C. Cir. 2001).

1 For the forgoing reasons, the Defendant asks this Court to postpone the determination  
 2 under LCR 23 (i)(3), and note a subsequent hearing at the Court's discretion.  
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4 **B. Alternatively, the Plaintiffs have failed to meet their burden under Federal Rule Of Civil  
 5 Procedure 23(a).**

6 FCRP 23(a) and LCR 23 (i)(2) outline the prerequisites for one or more members of a class to  
 7 sue as representatives on behalf of all members of the class. The Plaintiffs bear the burden of  
 8 proving that the requirements for class certification are meet beyond a preponderance of the  
 9 evidence.<sup>25</sup> FCRP 23(a) outlines the four necessary requirements: numerosity, commonality,  
 10 typicality, and adequacy. Additionally, the Plaintiff must adequately define the proposed class.<sup>26</sup>

11 **1. Plaintiffs fail to sufficiently define the proposed class.**

12 Plaintiffs must possess the same interest and suffer the same injury as the class members  
 13 they seek to represent.<sup>27</sup> A proposed class must be sufficiently defined so that it is  
 14 administratively feasible for the court to determine whether a particular individual is a member  
 15 of the class.<sup>28</sup> When considering class certification related to violations of the ADA the  
 16 definition of the effected disabilities is relevant to determining if there will be class members  
 17 who will have conflicting claims and defenses.<sup>29</sup> The majority of courts that have addressed class  
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 22 <sup>25</sup> See, *Sprint Commc'nns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 128 S. Ct. 2531, 171 L. Ed. 2d 424 (2008).

23 <sup>26</sup> See, *Davoll v. Webb*, 160 F.R.D. 142, 144 (D. Colo. 1995), *aff'd*, 194 F.3d 1116 (10th Cir. 1999).

24 <sup>27</sup> See, *E. Texas Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977).

<sup>28</sup> See, *Access Now Inc. v. Walt Disney World Co.*, 211 F.R.D. 452, 455 (M.D. Fla. 2001). (Holding that 93,000 wheelchair users presented to vague a definition of the proposed class).

<sup>29</sup> See, *Walt Disney World Co.*, 211 F.R.D. at 455 .

1 definition as it related to disability claims have sought to narrow the prospective class of  
 2 persons.<sup>30</sup>

3 Here, the definition of the class as it relates to the disability at issue in the Plaintiffs' suit  
 4 will have bearing on numerosity, commonality, typicality, adequacy, and the determination of  
 5 whether the Whatcom County Jail refused act on grounds that apply generally to all class  
 6 members under FCRP 23(b)(2). The Plaintiffs define their prospective class as non-pregnant  
 7 persons diagnosed with OUD, and denied MAT by the Whatcom County jail pursuant to general  
 8 policy. While the definition is narrow in its scope, the definition fails to properly define members  
 9 of the class because it fails to address the individualized medical nature of MAT treatment. Not  
 10 all members of the Plaintiff's proposed class will receive the same medical treatment. Further,  
 11 the Plaintiffs' class definition does not include pregnant OUD inmates. To draw the class  
 12 distinction excluding pregnant OUD inmates fails to consider the effect of the Whatcom County  
 13 Jail's MAT policies on all OUD inmates. Whatcom County Jail policy on administering MAT  
 14 does not apply generally to all people with the disability of OUD.

15 Therefore, it is not administratively feasible to determine if the named Plaintiffs are  
 16 representative of the class they seek to represent.

17 **2. Mr. Eubanks, Mr. Kortlever, and any unnamed plaintiffs are not so**

18 **numerous that joinder of their claims is impractical.**

19 FCRP 23(a) (1) requires the proposed class be so numerous that joinder of the all  
 20 members is impractical.<sup>31</sup> Class certification is unnecessary if granting injunctive relief would  
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23 <sup>30</sup> See *Id.* See also, *Nat'l Fed'n of Blind v. Target Corp.*, 582 F. Supp. 2d 1185, 1189 (N.D. Cal. 2007). See also,  
 24 *Colorado Cross-Disability Coal. v. Taco Bell Corp.*, 184 F.R.D. 354, 357 (D. Colo. 1999).

necessarily benefit all other proposed class members.<sup>32</sup> There is no threshold number that satisfies the numerosity requirement outlined in FCRP 23(a) (1).<sup>33</sup> The Second Circuit has stated that numerosity is presumed at a level of more than forty members.<sup>34</sup> Alternatively, the United States Supreme Court has viewed fifteen member proposed classes as too small to meet the numerosity requirement.<sup>35</sup> The impact on unnamed future class members may affect the prerequisite of numerosity. In Rivera v. Holder the Western District of Washington evaluated the Plaintiff's argument that hundreds of alien detainees were detained in Seattle each month, and found that it was highly plausible that the proposed class size would exceed forty.<sup>36</sup> In Rivera v. Holder numerosity was found by making a reasonable approximation of the number of future class members.<sup>37</sup>

Here, there are two currently name Plaintiffs. Additionally, Plaintiffs name all other similarly situated people as potential future class members. The Plaintiffs identify the class as OUD persons not diagnosed as pregnant while incarcerated at the Whatcom County Jail. The Plaintiff argues that two hundred and fifty-three people booked into the Whatcom County Jail in 2016 self-reported the abuse of heroin or opiates.<sup>38</sup> The Plaintiffs thereby estimate a class size in excess of one hundred each year.<sup>39</sup> Plaintiffs argue that numerosity is presumptively satisfied

<sup>31</sup> Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998).

<sup>32</sup> See, Walt Disney World Co., 211 F.R.D. 452, 455

<sup>33</sup> See, Trevizo v. Adams, 455 F.3d 1155 (10<sup>th</sup> Cir. 2006).

<sup>34</sup> See, Consol. Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir. 1995). (citing, 1 *Newberg On Class Actions* 2d, (1985 Ed.) § 3.05)

<sup>35</sup> See, Gen. Tel. Co. of the Nw. v. Equal Employment Opportunity Comm'n, 446 U.S. 318, 330, 100 S. Ct. 1698, 1706, 64 L. Ed. 2d 319 (1980).

<sup>36</sup> Rivera v. Holder, 307 F.R.D. 539, 550 (W.D. Wash. 2015).

<sup>37</sup> *Id.* at 550.

<sup>38</sup> See, Complaint. p. 6 at No. 23. See also, Complaint Exhibit 1. See also, Plaintiff's Motion to Certify Class at 13.

<sup>39</sup> See also, Plaintiff's Motion to Certify Class at 13.

1 based on their estimate.<sup>40</sup> However, the only exhibit cited by Plaintiffs does not provide this  
 2 court with sufficient information to determine whether it is plausible that hundreds of OUD  
 3 inmates are booked into the Whatcom County Jail. The self-reported abuse of drugs does not  
 4 translate to a formal diagnosis of a medical condition. OUD is a condition listed under the DSM-  
 5. There is no evidence that the inmates that reported abuse of opiates have been diagnosed with  
 6 OUD. Given the specific nature of the medical diagnosis required to be among the Plaintiff's  
 7 prospective class it is not reasonable to approximate future members of the class. It is this  
 8 medical distinction that makes this case distinguishable from Rivera v. Holder. Without  
 9 conducting some form of discovery there is an insufficient factual record to make a reasonable  
 10 approximation of the number of inmates diagnosed with OUD in the Whatcom County Jail.  
 11 Additionally, class certification is unnecessary because the Plaintiffs seek injunctive relief that  
 12 would necessarily benefit the proposed class in its entirety.

13 Therefore, Defendant respectfully asks the motion to certify class be denied.

14 Alternatively, the Defendant respectfully asks the Court to postpone the determination under  
 15 LCR 23 (i)(3), and note a subsequent hearing at the Court's discretion to allow further discovery  
 16 on issue of numerosity.

17 **3. Plaintiff's motion for class certification has not met the burden of  
 18 commonality, typicality, or adequacy of representation under FRCP 23 (a).**

24 <sup>40</sup> *Id.*

1 The requirements of commonality, typicality and the adequacy of representation have a  
 2 tendency to merge.<sup>41</sup>

3 FCRP 23(a)(2) requires that resolution of a common issue shared among members of  
 4 prospective class.<sup>42</sup> Commonality requires Plaintiffs to demonstrate that they have suffered the  
 5 same injury, not merely injury under the same general provision of law.<sup>43</sup> Discrepancy in the  
 6 factual allegations of one Plaintiff versus another may create conceptual gaps between claims of  
 7 proposed class members.<sup>44</sup> It is true that system wide practices that affect all members of a  
 8 punitive class satisfy commonality.<sup>45</sup> When considering class certification for alleged violations  
 9 of the ADA the definition of the effected disabilities is relevant to determining if there will be  
 10 commonality in the issues of law presented among the prospective class members.<sup>46</sup>

11 Under FCRP 23 (a)(3) Typicality is satisfied when plaintiffs allege similar injuries as the  
 12 other prospective members of the putative class typicality, and that the injury is the result of a  
 13 common course of conduct central to class claims.<sup>47</sup> Claims need not be identical, but instead  
 14 they must be typical of the class.<sup>48</sup>

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20 <sup>41</sup> See, *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982). See also, *Robinson v. Sheriff of Cook Cty.*, 167 F.3d 1155, 1157 (7th Cir. 1999).

21 <sup>42</sup> See, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011).

22 <sup>43</sup> See, *Id.*

23 <sup>44</sup> See, *Id.* See also, *Falcon*, 457 U.S. at 157.

24 <sup>45</sup> See, *Civil Rights Educ. & Enf't Ctr. v. Hosp. Properties Tr.*, 317 F.R.D. 91, 102 (N.D. Cal. 2016), aff'd, 867 F.3d 1093 (9th Cir. 2017).

25 <sup>46</sup> See, *Walt Disney World Co.*, 211 F.R.D. at 455.

<sup>47</sup> See, *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014).

<sup>48</sup> See, *Id.*

1 FRCP 23 (a)(4) requires the Plaintiffs are adequate representatives of the class they seek  
 2 to represent. Plaintiffs must have an interest in vigorously pursuing the claims common to the  
 3 class, and must not have interest in opposition to other class members.<sup>49</sup>

4 Here, the medical nature of Plaintiff's suit presents a lack of commonality. While both  
 5 named Plaintiffs are both currently prescribed the same brand name drug Suboxone, other  
 6 persons suffering from OUD may receive fundamentally different prescription drugs. Within the  
 7 Plaintiff's proposed class the courses of treatment may vary greatly. MAT is an individualized  
 8 medical treatment procedure.<sup>50</sup> MAT protocols vary from patient to patient. Therefore, the  
 9 Plaintiffs have not satisfied commonality under FRCP 23 (a)(2).

10 The medical nature of Plaintiffs suit also presents non-typical claims. While the two  
 11 named Plaintiffs are both currently prescribed Suboxone, their treatment is individualized. Both  
 12 named Plaintiff's likely receive differing doses and have other discrepancies within their  
 13 treatment protocol. Mr. Eubanks takes six other prescription drugs for a variety of other medical  
 14 conditions.<sup>51</sup> Mr. Kortlever only takes Suboxone.<sup>52</sup> Mr. Eubanks and Mr. Kortlever receive  
 15 different medical treatment for OUD based on their unique medical concerns.

16 Under FRCP 23 (a)(4) the Plaintiffs are not adequate representatives of the class they  
 17 seek to protect. The Plaintiffs seek to include all other similarly situated persons, but all  
 18 similarly situated persons suffering from OUD receive varying medical treatment based on the  
 19 individual nature of their medical history and current conditions. There is variance among the  
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22 <sup>49</sup> See, *Denney v. Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006).

23 <sup>50</sup> See, Fullerton et. al., "Medication-Assisted Treatment with Methadone: Assessing the Evidence," *Psychiatric Services* 65, no. 2, p. 146.

24 <sup>51</sup> See, Exhibit 1, p. 1 at No. 13.

<sup>52</sup> See, Exhibit 2, p. 1 at No. 13.

1 drugs prescribed for OUD, and doses vary within the same drug prescriptions. A person  
 2 prescribed Suboxone by a medical provider is not representative of another person prescribed  
 3 Methodone for the same underlying diagnosis of OUD.

4 For the foregoing reasons the Plaintiffs have failed to meet their burden under FRCP  
 5 23(a), and the motion to certify class should be denied.

6 C. The Plaintiffs have failed to meet their burden under Federal Rule of Civil Procedure  
 7 23(b)(2).

8 FCRP 23(b) (2) requires that the party opposing the class has refused to act on grounds  
 9 that apply generally to all class members.

10 The Whatcom County Jail administers varying medical treatment among inmates  
 11 diagnosed with OUD. The most notable variance in OUD treatment within the Whatcom County  
 12 Jail is that OUD persons that test positive during pregnancy testing are treated with MAT in the  
 13 form of the drug Subutex. The Whatcom County Jail has not employed a system wide policy of  
 14 denying MAT to persons suffering from OUD. MAT treatment is an individualized medical  
 15 treatment procedure.<sup>53</sup> MAT protocols vary from patient to patient.

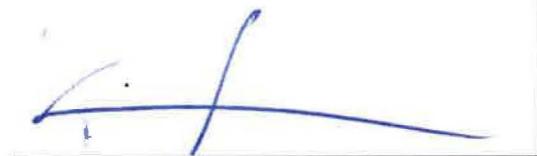
16 Therefore, the Plaintiffs have not shown a policy of general refusal to act under FRCP 23  
 17 (b)(2).

18 CONCLUSION

19 The Plaintiffs have not satisfied their burden under FRCP 23(a). Alternatively,  
 20 certification should be postponed pursuant to FRCP 23 (c).

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 24 <sup>53</sup> See, Fullerton et. al., "Medication-Assisted Treatment with Methadone: Assessing the Evidence," *Psychiatric Services* 65, no. 2, p. 146.

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2 DATED this 29<sup>th</sup> day of June, 2018.  
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